UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 04-103-P-H***
	)	
KRYSTAL M. CANNIZZARO,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

Krystal M. Cannizzaro, charged with knowingly making a false statement on or about June 5, 2003 in connection with the acquisition of two firearms from the Kittery Trading Post in Kittery, Maine, in violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(2), *see* Indictment (Docket No. 4), seeks to suppress statements made and evidence seized during, and as a result of, encounters with South Portland police officers and U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") agents on June 5 and 6, 2003, *see* Defendant's Motion To Suppress ("Motion To Suppress") (Docket No. 19).[1] An evidentiary hearing was held before me on February 14, 2005 at which the defendant appeared with counsel. I now recommend that the following findings of fact be adopted and that the Motion To Suppress be denied.

I. Proposed Findings of Fact

On June 5, 2003 Boston-based ATF special agent Daniel Meade received a phone call from Joe Simpson of the Kittery Trading Post in Kittery, Maine advising him that a firearms transaction that Simpson

[1] Specifically, Cannizzaro is charged with having answered "Yes" to Question 12(a) on ATF Form 4473, which asked if she (*continued on next page*)

termed "suspicious" was about to take place in the store.[2] Meade, who then was assisting the Merrimack Valley Task Force in an investigation of guns and drugs, knew Simpson, who had recently helped him with another Kittery Trading Post-related case. Simpson told Meade that, via the store's video surveillance system, he had observed the following:

1. Two black men entered the store and looked at a gun, then departed and went to a white Lincoln Town Car with Massachusetts license plates ("Lincoln") parked in the store's parking lot.

2. One of the men pulled out cash and handed it to someone in the back seat of the vehicle.[3]

3. A woman got out of the car, went inside the store and attempted to buy the same gun the men had just viewed. A store attendant asked her a question, and she said she needed to ask her boyfriend. She went back to the Lincoln, got inside, then returned to the store with the two men who originally had looked at firearms.

4. The woman filled out paperwork for the purchase of firearms. One of the men stood next to her at the counter.

Meade instructed Simpson to hold up approval of the transaction until he could arrive to set up surveillance. Because the Lincoln had Massachusetts plates, Meade anticipated that the occupants were going to return to Massachusetts – an itinerary that would constitute illegal interstate transportation of firearms.[4] He also believed that the transaction was a "straw purchase" – that is, that the woman was

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was "the actual buyer of the firearm(s) listed on this form[,]" when, as she well knew, the answer was false. *See* Indictment.

[2] While Meade phrased it this way, in notifying ATF Simpson obviously took pains to avoid participation by the Kittery Trading Post in a possibly illegal firearms transaction.

[3] On cross-examination, Meade acknowledged that Simpson did not specifically tell him that the money had been passed to Cannizzaro. However, he said that based on his own later viewing of the surveillance tape, he concluded that it had been passed to her. He also acknowledged that he did not know how much money was exchanged and that it could have been exchanged for any number of reasons – for example, payment of past-due child support.

[4] Meade so testified. The government also cites 18 U.S.C. § 922(a)(3) for this proposition. *See* Government's Objection

(*continued on next page*)

buying firearms not for herself but for one or both of the men. Meade and two other law-enforcement officers (another ATF special agent and a Newbury, Massachusetts, police officer who was a member of the Merrimack Valley Task Force) set out in separate cars for the Kittery Trading Post, arriving approximately thirty to forty-five minutes later. Meade drove through the store's parking lot and spotted the Lincoln, after which he positioned his car some distance away to maintain surveillance. From inside of his car he remained in contact with Simpson, whom he instructed to permit the sale to go through. He also requested a license-plate check, through which he learned that the Lincoln was registered to someone named Jessica Singleterry.

Simpson advised Meade that a sale of two firearms had been completed in two separate transactions, with separate paperwork filled out for each. He told Meade that, via video camera, he had seen the three individuals return to the Lincoln, one of the men place the firearms in the trunk and the woman (who had been identified as Krystal Cannizzaro) hug one of the men.

The Lincoln departed, and Meade followed it for a distance. When, contrary to Meade's expectations, the Lincoln continued north, he reasoned that the occupants might be destined for South Portland, Maine, Cannizzaro having supplied a South Portland address on the Kittery Trading Post paperwork she had just completed. Meade contacted the South Portland Police Department and spoke with a Lieutenant Clark.[5] He requested that the South Portland police keep an eye out for the Lincoln, which he said he believed was headed for 80 Powers Road, South Portland. He provided the license-plate

to Defendant's Motion To Suppress ("Objection") (Docket No. 27) at 8; 18 U.S.C. § 922(a)(3) (prohibiting persons other than enumerated licensed persons from, *inter alia*, transporting firearm purchased outside state of residence into state of residence).

[5] Neither Meade nor any other witness at hearing supplied Lieutenant Clark's first name.

number of the car, which he warned contained firearms. He asked that, if possible, police obtain identification of the Lincoln's occupants.

Meade returned to the Kittery Trading Post, where he watched the surveillance tape of the transaction and found it consistent with Simpson's report. He left a message on the cell phone of Portland, Maine ATF special agent Malcolm Van Alstyne. He did not attempt to stop the Lincoln himself because he was alone in his car and because, before being sure he had probable cause to make an arrest, he wanted to view the Kittery Trading Post surveillance tape, look at the forms Cannizzaro had completed and obtain background information on the two men.

After Meade contacted the South Portland Police Department, Lieutenant Clark spoke to Sergeant Frank Clark (no relation), who was the sergeant on duty that evening. Lieutenant Clark advised Sergeant Clark that he had received a call from ATF, which was investigating a suspected straw firearms purchase. He asked Sergeant Clark to be on the lookout for the Lincoln and relayed its license-plate number. He advised Sergeant Clark that Krystal Cannizzaro, whose address was 80 Powers Road, South Portland, was involved in the apparent straw purchase. Sergeant Clark was to see if he could obtain identification of the Lincoln's occupants and ascertain if and when they planned to return to Massachusetts.

Sergeant Clark, who was driving a marked police cruiser, relayed the details of the ATF investigation to two other South Portland police officers, Kevin Webster and Steve Connors, each of whom was driving a separate, marked police cruiser. At about 8:20 p.m. Sergeant Clark spotted a white Lincoln Town Car with Massachusetts license plates and observed it turn into an Irving Mainway gas station/convenience store on Westbrook Street in South Portland. He drove by the Irving station and confirmed that the vehicle's license-plate number matched the one he had been given. He radioed Webster and Connors, filling them in and directing them to stop the Lincoln if it approached either of their locations

and if they could find an independent reason to do so (for example, observation of a traffic violation). During the time Sergeant Clark was observing the vehicle, he saw no violations of traffic laws.

Webster spotted and followed the Lincoln, which proceeded to the so-called "Redbank" apartment complex, a residential area consisting of World War II-era duplexes. Webster observed no traffic violation or other conduct that would justify stopping the Lincoln. Therefore, he did not stop it. Sergeant Clark advised Webster and Connors that, under the circumstances, the officers would perform a so-called "non-custodial stop," also known as a "field investigation" or "FI."[6] After Webster had followed the vehicle for about half a mile, it pulled into the driveway of 80 Powers Road, part of the Redbank neighborhood. Webster parked his car across the street from the driveway. Connors parked a little way down the road from Webster. Both approached the vehicle's occupants. Webster asked the driver, a female, for identification. She produced a Maine driver's license bearing the name of Krystal Cannizzaro. By this time Sergeant Clark had joined Webster and Connors.

Sergeant Clark, who had followed a different route to the Redbank neighborhood, parked across the street from 80 Powers Road, arriving at approximately 8:26 p.m. He exited his cruiser, crossed the street and approached the two black males who had gotten out of the passenger side of the vehicle. He asked if there were any weapons or firearms in the vehicle, and the men said there were not. He then asked Cannizzaro if there were any weapons. She said she had purchased two firearms from the Kittery Trading Post, both of which were in the trunk.

[6] At hearing, Sergeant Clark testified that this type of stop is designed to minimize the custodial atmosphere – for example, it often is used during evening hours if there has been a reported burglary or car break-in. Officers will approach people walking on the street in the area of the crime and ask for identification (*e.g.*, names and dates of birth).

Sergeant Clark performed a quick pat-down check of both males, finding no weapons on either. He also asked for identification; neither man provided any. However, the men gave their names as Isaiah Andrews and Tavon Bowden. They also provided dates of birth, addresses and phone numbers. Sergeant Clark inquired if either man had any felony convictions. Bowden said he had been arrested but had no felony convictions. Andrews denied that he ever had been arrested.

Sergeant Clark took the information he had jotted down from the two men, plus the Maine driver's license that Webster had obtained from Cannizzaro, and went back to his cruiser to request that dispatch run motor-vehicle and criminal-history checks on all three individuals. This process took about twenty minutes, during which time Sergeant Clark remained in his cruiser and Webster and Connors continued to talk with the Lincoln's occupants. The door to the 80 Powers Road residence was open, and Webster saw another woman inside the house. He did not request that she come outside.

Webster asked Cannizzaro if he could see the weapons she had told Sergeant Clark she had purchased or had in her possession. She opened the trunk, and he observed therein two firearms and fifty rounds of ammunition. He checked the firearms and determined that they were unloaded. He also viewed the Kittery Trading Post receipt for the weapons. Webster also performed a pat-down search of the outside of Cannizzaro's clothing to check for weapons, finding none.

After Sergeant Clark obtained the background-check results, he returned Cannizzaro's driver's license to Webster. Webster informed Sergeant Clark that he had seen the firearms and receipt from the Kittery Trading Post. No occupant of the Lincoln was handcuffed or otherwise restrained during the encounter. Sergeant Clark did not activate his blue emergency lights at any time. None of the three cruisers was parked in such a manner as to block the Lincoln. Sergeant Clark described the demeanor of the Lincoln's occupants during the encounter as "low-key, mellow, cooperative – nothing out of the ordinary."

Sergeant Clark did not, at any time, inform Cannizzaro, Andrews or Bowden that any of them was free to leave or to terminate discussions with the officers. The officers left the premises at about 8:54 p.m., approximately thirty minutes after they had first approached the Lincoln's occupants. None of the Lincoln's occupants was placed under arrest. Sergeant Clark had no probable cause to believe there had been any violation of state law and is not cross-designated to make arrests on federal charges. Sergeant Clark relayed the results of the questioning and criminal-history check to Lieutenant Clark, who said he was going to pass the information on to ATF.

The following morning, ATF special agent Van Alstyne retrieved the voice mail that had been left by Meade the previous evening. He immediately returned the call. Meade filled him in on the details of the suspected straw purchase and told him that he (Meade) had determined, after speaking with South Portland police and police in Massachusetts who were familiar with Bowden, that at least one of the two male occupants of the Lincoln was prohibited from possessing a firearm. Meade also informed Van Alstyne that, according to Massachusetts police, Bowden was suspected of having been involved in an armed robbery in that state. Meade asked Van Alstyne to go to the 80 Powers Road residence and determine if the firearms were still there. At about 9:30 or 10:00 that morning, Van Alstyne, accompanied by ATF special agent Mike Grasso, knocked on the door of the 80 Powers Road residence.

An adult female answered the door; Van Alstyne did not remember if it was Cannizzaro or a woman Cannizzaro later identified as her sister. He and Grasso identified themselves and told Cannizzaro they wanted to talk to her about the firearms she had bought the day before. When Van Alstyne saw Cannizzaro, it was apparent to him that she had just woken up. Because Cannizzaro's five-year-old son was present, Van Alstyne asked that they speak out of his earshot. Cannizzaro led the agents to some steps in back of the house. She sat down on the steps, while the agents remained standing. As Grasso took

notes, Cannizzaro told the agents that her son's father, Bowden, was supposed to pick her up the previous day at her mother's house in Somerville, Massachusetts, and drop her off at a train or bus station. However, the plan changed when Bowden, accompanied by Josh Andrews, arrived in the Lincoln, which was Andrews' girlfriend's car.[7] Bowden informed Cannizzaro he was going to drive her all the way home. On the way to Maine, Bowden told Cannizzaro that if she bought two firearms, one for him and one for her, he would give her the money to buy both. Nonetheless, Cannizzaro told the agents, after the encounter the previous night with South Portland police, she had told Bowden that both guns would remain in the house. Van Alstyne asked if Cannizzaro minded if the agents looked at the guns. As Van Alstyne phrased it, "She gave us consent to go upstairs to the room where she said she had placed the guns."

Cannizzaro led the agents to an upstairs room where they found no guns – only an empty Kittery Trading Post bag and empty wrappers. Cannizzaro told them that Bowden and Andrews had left the house early that morning before she woke up. While the three were upstairs, Cannizzaro received a phone call. She indicated to the agents that it was Bowden. Van Alstyne mouthed the words, "Where is he?" Cannizzaro was unsuccessful in ascertaining his location before the call ended. She phoned his number, but he did not pick up.

Van Alstyne did not search the rest of the house for the firearms because he found Cannizzaro to be very cooperative and genuine, and he had no reason to doubt her version of events. She permitted the agents to take the Kittery Trading Post bag and wrappers. The agents did not advise her that she did not have to talk to them or that she could terminate questioning at any time. She did not at any time ask them to leave. Van Alstyne described their conversation as "very relaxed." Although Van Alstyne was armed, his

[7] Van Alstyne learned that Andrews' first name was Josh or Joshua, not Isaiah as Andrews had told the South Portland (*continued on next page*)

weapon was concealed from view. Van Alstyne did not arrest Cannizzaro that day in large part because she had been very cooperative. However, a couple of days later, he sought and received a target letter that he served on her.

II. Discussion

Cannizzaro moves to suppress, as "fruit of the poisonous tree," all evidence seized and statements made to police during or as a result of assertedly unconstitutional "*Terry* stops" by South Portland police on June 5, 2003 and by ATF agents the following morning. *See generally* Motion To Suppress; *see also, e.g., United States v. Kimball*, 25 F.3d 1, 5-6 (1st Cir. 1994) (if *Terry* stop illegal, "evidence seized by virtue of that stop, such as the tools in this instance, may be subject to exclusion under the 'fruit of the poisonous tree' doctrine.") (citing *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963)). When, as here, a defendant challenges a warrantless search and/or seizure, the government bears the burden of demonstrating the lawfulness of the challenged conduct. *See, e.g., United States v. Ramos-Morales*, 981 F.2d 625, 628 (1st Cir. 1992). The government argues as a threshold matter that *Terry*-stop standards never even were implicated inasmuch as neither contact constituted a "seizure" for Fourth Amendment purposes. *See* Objection at 6-7. Alternatively, it contends that even if the interactions fairly can be characterized as *Terry* stops, South Portland police and ATF agents possessed the requisite articulable suspicion to justify them. *See id*. at 8-9. While I agree with the government that the questioning by ATF agents did not constitute a seizure for Fourth Amendment purposes, I conclude that the encounter with South Portland police did constitute a seizure in at least one particular: the pat-down searches.

police.

Nonetheless, the government carries its burden of proving that, with respect to both encounters, police and ATF agents possessed the requisite reasonable suspicion to justify any *Terry*-stop intrusion.

A. Whether Stops Constituted Seizure

The First Circuit has observed:

> In *Terry v. Ohio,* [392 U.S. 1 (1968)], the Supreme Court first recognized that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. This authority permits officers to stop and briefly detain a person for investigative purposes, and diligently pursue a means of investigation likely to confirm or dispel their suspicions quickly.

United States v. Trueber, 238 F.3d 79, 91-92 (1st Cir. 2001) (citations and internal punctuation omitted). As this wording suggests, the *Terry* doctrine is implicated only when a person has been stopped and briefly detained, or "seized," for Fourth Amendment purposes. *See, e.g., United States v. Cardoza*, 129 F.3d 6, 14 (1st Cir. 1997) ("To be sure, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Instead, interaction between law enforcement officials and citizens generally falls within three tiers of Fourth Amendment analysis, depending on the level of police intrusion into a person's privacy. The first tier encompasses interaction of such minimally intrusive nature that it does not trigger the protections of the Fourth Amendment. It has therefore been recognized that police officers may approach citizens in public and ask questions without the need for articulable suspicion of criminal activity.") (citations and internal punctuation omitted).

"[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Id*. at 15 (citation and internal quotation marks omitted). The test is an

objective, rather than a subjective, one. *See id*. ("[T]he test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person.") (citation and internal quotation marks omitted). Police questioning, alone, is not tantamount to the requisite restraint on liberty. *See id*. at 15-16 ("Our inquiry is not directed at whether the police conduct objectively communicated police desire to *speak* to Cardoza, or ask him a *question*. Rather, we must determine whether their conduct indicated that they were interfering with his *liberty* to such an extent that he was not free to leave.") (emphasis in original) (footnote omitted); *see also, e.g., Florida v. Bostick*, 501 U.S. 429, 434 (1991) ("Since *Terry*, we have repeatedly held that mere police questioning does not constitute a seizure.").

The June 5, 2003 encounter between South Portland police and Cannizzaro was low-key and cooperative, with officers neither blocking the Lincoln, activating their blue lights, drawing their weapons nor barking commands. Apart from the pat-down searches – which I will discuss in a moment – the encounter did not have the earmarks of a seizure. *See, e.g., United States v. Trujillo*, 316 F. Supp.2d 1163, 1170-71 (D. Utah 2004) (encounter in which three officers approached defendant after he parked near a driveway, and one briefly questioned him, did not constitute seizure when none of officers touched defendant, drew weapon, asked questions in aggressive or intimidating manner, asked him to accompany them to police station or obtained or retained any of his belongings).

Nonetheless, the law is clear that a pat-down search – even in the form of a brief touch of outer clothing only – constitutes a sufficient restraint on a suspect's liberty to implicate the search and seizure protections of the Fourth Amendment. *See, e.g., Richards v. Wisconsin*, 520 U.S. 385, 394-95 (1997) (noting that *Terry* requires "a reasonable and articulable suspicion of danger to justify a patdown search");

United States v. Chhien, 266 F.3d 1, 7 (1st Cir. 2001) (describing a pat-down search as amounting to "a *Terry* stop within a *Terry* stop"); *United States v. Davis*, 202 F.3d 1060, 1062 (8th Cir. 2000) ("*Terry* leaves no doubt that a pat-down search is a seizure.") (footnote omitted); *United States v. Villanueva*, 15 F.3d 197, 199 (1st Cir. 1994) (characterizing "a pat-down of even the slightest character" as "a search").[8]

That said, the fact that officers conducted a pat-down search does not in itself retroactively convert the encounter into an investigative *Terry* stop from its inception. As the Court of Appeals for the Eighth Circuit has explained:

> Although we agree with Davis that conduct after an investigative stop begins cannot supply the reasonable suspicion needed to justify the [*Terry*] stop, we cannot agree that the pat-down search of Blount was an investigative stop. *Terry* leaves no doubt that a pat-down search is a seizure. But it need not follow from the fact that Blount was momentarily seized during the protective frisk that the frisk was also an investigative stop. The two types of seizures have distinct law enforcement justifications. During an investigative stop, the officer may briefly detain a person while the officer investigates his reasonable suspicion that criminal activity is afoot. A pat-down search, on the other hand, protects the officer's personal safety while dealing with a person he reasonably believes may be armed and presently dangerous. To be constitutionally reasonable, a protective frisk must also be based upon reasonable suspicion that criminal activity is afoot, and therefore pat-down searches normally occur during investigative stops of persons suspected of criminal activity. But the two types of seizures are analytically distinct, as is evidenced by the fact that the Supreme Court in *Terry* upheld the constitutionality of a pat-down search *without considering* whether an investigative stop preceded the protective frisk.

Davis, 202 F.3d at 1062 (emphasis in original) (footnote omitted). Here, as in *Davis*, officers "did nothing to change the consensual nature of the encounter except frisk [the defendant] for weapons. When that momentary seizure ended, [the defendant] remained free to answer [the officer's] questions or to leave

[8] The government does not argue that Cannizzaro consented to the pat-down search of her person. In any event, "when [the government] seeks to rely upon consent to justify the lawfulness of a search, [it] has the burden of proving that the consent was, in fact, freely and voluntarily given." *United States v. Esquilin*, 42 F. Supp.2d 20, 27 (D. Me. 1999), *aff'd*, 208 F.3d 315 (1st Cir. 2000) (citation and internal quotation marks omitted). The government adduced no evidence whatsoever that Cannizzaro expressly or impliedly consented to that search.

(assuming the search uncovered no weapons)." *Id*.[9] A separate question remains whether the protective search itself was justified. I answer that question in the affirmative in Part B of my discussion, below.

I turn to Cannizzaro's encounter with ATF agents on the morning of June 6, 2003. Courts have characterized interactions of that nature as "knock and talk" encounters. *See, e.g., United States v. Zertuche-Tobias*, 953 F. Supp. 803, 829 (S.D. Tex. 1996) ("The first issue implicated by Zertuche's argument, although Zertuche does not assert it explicitly, is whether the officers' knocking on the front door and *requesting* to talk to Zertuche, often referred to by the police as a "knock and talk," constituted a custodial interrogation or otherwise implicated the Fourth Amendment. . . . [T]he "knock and talk" technique, a noncustodial procedure where the officer identifies himself and asks to talk to the home occupant and then eventually requests permission to search the residence, has been recognized as a manner of consent search.) (emphasis in original) (citations and internal quotation marks omitted); *United States v. Powell*, 929 F. Supp. 231, 232 n.3 (S.D. W.Va. 1996) ("A 'knock and talk' occurs where the officer (1) visits the residence, (2) identifies himself, (3) asks to be admitted to the house, and (4) then seeks consent to search. The utility of this procedure to law enforcement is obvious: It avoids the necessity of securing a search warrant from a judicial officer. While the potential for abuse is apparent, courts and commentators appear to concur the practice can be lawful.") (citations omitted).

In such circumstances, as the Court of Appeals for the Seventh Circuit has observed, there is a slight twist in the classic test of whether a seizure has occurred:

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[9] Apart from the pat-down search, there is one other noteworthy distinction between the Cannizzaro encounter and that described in *Trujillo*: whereas, in *Trujillo*, none of the officers "obtained" the defendant's belongings, *see Trujillo*, 316 F. Supp.2d at 1171, Webster asked to see the firearms Cannizzaro had said were in the trunk and handled them to ensure they were unloaded. Nonetheless, unlike in the case of the pat-down search, the government adduced evidence that Cannizzaro affirmatively consented to this particular intrusion. Under the circumstances, I do not believe this portion of the encounter changed its overall consensual flavor.

> In *United States v. Jerez*, 108 F.3d 684 (7th Cir.1997), we considered the appropriate scrutiny to apply to the "knock and talk" procedure wherein officers approach a residence in which they suspect illegal activity is occurring, knock on the door, and then attempt to gain consent to enter. The court noted that as a general matter, officers may approach a willing person in a public place and ask that person questions without violating the Fourth Amendment. There is no seizure of the person in those circumstances unless the person would not have felt free to leave. Where officers are approaching a person in a confined space, however, such as a bus, the free-to-leave question is unhelpful. In such a circumstance, the appropriate inquiry is whether a reasonable person would feel free to decline the officers' request or otherwise terminate the encounter.

United States v. Adeyeye, 359 F.3d 457, 461 (7th Cir. 2004) (citations and internal quotation marks omitted).

I have little trouble concluding that, in this case, a reasonable person in Cannizzaro's position would have felt free to decline the agents' requests or otherwise terminate the encounter. The two ATF agents (Van Alstyne and Grasso) approached the 80 Powers Road residence at a reasonable hour of day – approximately mid-morning. While Van Alstyne testified that Cannizzaro appeared to have just awoken, there is no suggestion that this in any way compromised her ability to interact with the agents. The agents knocked, identified themselves and announced the purpose of their visit, asking to speak with Cannizzaro. No show of force was made (indeed, Van Alstyne's weapon was concealed), and no commands, threats or otherwise aggressive language was used. From all that appears, neither agent laid a hand on Cannizzaro.

Cannizzaro's own behavior, in the circumstances, underscores the impression that a reasonable person would not have felt compelled to submit to a show of police authority. She was at all times cooperative – leading the agents to the back steps after Van Alstyne suggested they converse out of earshot of her son, taking the agents upstairs to view the firearms and permitting them to retain the Kittery Trading Post bag and wrappers. In fact, Van Alstyne refrained from arresting her that day in large part because she was so cooperative. She never asked the agents to leave or terminate their questioning. Indeed, the tone of

the agents' conversation with her that morning was described by Van Alstyne as "very relaxed." While the agents did not advise Cannizzaro that she was free to terminate the interview, that is not in itself dispositive of the existence of a Fourth Amendment seizure. *See, e.g., Trujillo*, 316 F. Supp.2d at 1171 (fact that officers who encountered defendant near driveway of residence and asked two questions were uniformed and did not advise him he had right to leave did not render encounter a seizure).

Accordingly, I conclude that while the June 5, 2003 encounter with South Portland police constituted a seizure to the extent of the pat-down searches, neither contact fairly can be characterized as an investigative *Terry* stop for purposes of Fourth Amendment analysis.

B. Whether Seizure, If Any, Justified

I next and finally consider the government's alternative argument: that any *Terry*-stop seizure of Cannizzaro was undertaken in such a manner as not to have violated her Fourth Amendment rights. For purposes of this discussion I assume *arguendo* – contrary to my findings in Part A, above – that both encounters constituted investigative *Terry* stops.

The validity of an investigative *Terry* stop hinges on "whether the officer's actions were justified at their inception, and if so, whether the actions undertaken by the officers following the stop were reasonably responsive to the circumstances justifying the stop in the first place as augmented by information gleaned by the officers during the stop." *Trueber*, 238 F.3d at 92 (citations and internal punctuation omitted). An "objective reasonableness standard" governs. *United States v. Moore*, 235 F.3d 700, 703 (1st Cir. 2000).

"The first part of the [*Terry*] inquiry is satisfied if the officers can point to specific and articulable facts which, taken together with rational inferences derived from those facts, reasonably show that an investigatory stop was warranted." *United States v. Maguire*, 359 F.3d 71, 76 (1st Cir. 2004). "To

withstand scrutiny [in the context of a *Terry* stop], an officer must be able to articulate something more than an inchoate and unparticularized suspicion or hunch." *Id*. (citations and internal quotation marks omitted). "[T]he focus is upon the collective knowledge possessed by, and the aggregate information available to, all the officers involved in the investigation." *United States v. Capelton*, 350 F.2d 231, 240 (1st Cir. 2003) (citation and internal quotation marks omitted) (observing that knowledge of DEA agents who undertook investigation could be imputed to state police who actually effectuated *Terry* stop under "fellow officer rule").

As of the time the three South Portland police officers approached Cannizzaro and her companions on the evening of June 5, 2003, they were operating on far more than "an inchoate and unparticularized suspicion or hunch." *Maguire*, 359 F.3d at 76 (citation and internal quotation marks omitted). ATF agents and South Portland police, collectively, knew that a Kittery Trading Post employee who had cooperated with the ATF in the past had contacted the ATF to report a suspicious firearms purchase, based on a scenario in which (i) two men were observed looking at a gun, (ii) those men left the store and returned to the Lincoln, (iii) a man handed money to someone in the back seat of the Lincoln, (iv) a woman exited the Lincoln, entered the store and began to look at the same gun the men had viewed and, when asked a question, indicated that she needed to confer with her boyfriend, (v) the woman left the store and returned with the two men, (vi) the woman filled out paperwork for two separate firearms purchases, and (vii) after consummating these purchases, one of the men placed the firearms in the trunk and hugged the woman. While defense counsel brought out, at hearing, that there could be innocent explanations for all of these activities – for example, that Bowden was handing Cannizzaro back-due child support money or the two men simply were advising Cannizzaro as to her own gun purchases – officers drew a reasonable

inference that Cannizzaro was involved in a straw purchase. Further investigation, by way of a *Terry* stop, was amply justified.

By the following morning, ATF agents Van Alstyne and Grasso had received even more incriminating information: Meade had verified that at least one of Cannizzaro's two companions was prohibited from possessing firearms. It follows that Van Alstyne and Grasso, as well, possessed the requisite reasonable, articulable suspicion to effectuate a *Terry* stop on the morning of June 6, 2003.

Cannizzaro does not appear to argue that, to the extent the two encounters in question were justified at their inception, officers' actions nonetheless exceeded the scope of a permissible *Terry* stop. *See generally* Motion To Suppress. In any event, I find no such fault with the officers' actions.

On the evening of June 5, 2003, none of the South Portland officers blocked the Lincoln, brandished their weapons, activated their blue lights, employed an aggressive tone of voice or touched Cannizzaro and her companions, apart from conducting brief pat-down searches. The entire encounter lasted only half an hour – just long enough for officers to obtain identifying data, receive results of criminal-history and motor-vehicle background checks and ask a few questions regarding the firearms. As in *Trueber*, the officers' conduct was well within the bounds of a permissible *Terry* stop. *See Trueber*, 238 F.3d at 94 ("First, the encounter occurred in neutral surroundings – on a public street. Second, while five government agents were present at the scene, no more than two were in direct proximity to Trueber, each in plain clothes, and only one questioned him. Further, mere numbers do not automatically convert a lawful *Terry* stop into something more forbidding. Third, the officers made no threats, brandished no weapons (other than the brief use by Pugliesi), and exerted no physical restraint upon Trueber's person beyond the limited pat-down Pugliesi conducted immediately after Trueber stepped out of the car. Finally, the encounter lasted no more than fifteen minutes, the agents conducted an investigation that was likely to

confirm or dispel their suspicions quickly, and their approach was measured and their conduct not bellicose.") (citations and internal punctuation omitted).

Finally, the pat-down searches themselves were justified, the officers having been advised that the Lincoln's occupants had just purchased weapons. *See, e.g., United States v. Romain*, 393 F.3d 63, 71 (1st Cir. 2004) ("[I]n determining whether a pat-down search is an appropriate step following a valid *Terry* stop, the key is whether, under the circumstances, the officer is justified in believing that the person is armed and dangerous to the officer or others.") (citation and internal quotation marks omitted).

Likewise, nothing about Van Alstyne's and Grasso's questioning of Cannizzaro the following morning raises a red flag that the agents exceeded the scope of a permissible *Terry* stop. Indeed, Van Alstyne and Grasso arranged that the interview discreetly be conducted out of earshot of Cannizzaro's young son and refrained from seeking to conduct a thorough search of the premises for the missing firearms on the strength of Van Alstyne's belief that Cannizzaro's account of what had transpired was credible. Finally, the cooperative and relaxed tone of the entire encounter, and Cannizzaro's attitude throughout, persuades me that the agents removed the Kittery Trading Post items with Cannizzaro's consent, which was freely and voluntarily given. *See United States v. Weidul*, 325 F.3d 50, 53 (1st Cir. 2003) ("[W]arrantless search and seizures in the home violate the Fourth Amendment, absent consent or exigent circumstances. Consent must be voluntary to be valid. Whether consent is voluntary is to be determined by examining the totality of the circumstances, including the interaction between the police and the person alleged to have given consent.") (citations and internal quotation marks omitted).

In short, the government carries its burden of proving that, to the extent the encounters in question were investigative *Terry* stops, they were justified from their inception and carried out in a permissible manner.

III. Conclusion

For the foregoing reasons, I recommend that the Motion To Suppress be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 16th day of February, 2005.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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